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TELEPHONIC COMMUNICATIONS IN EVIDENCE.

INTRODUCTORY.

As science advances, and new inventions are given to the world, questions that before were not dreamed of arise and must be passed on by the courts. Already we have a text book on automobiles, and it is not inconceivable that in the lifetime of many of us, we may see in our law library a book dealing with ærial navigation; or even the legal rights and liabilities of companies operating the new system of wireless telegraphy, in connection with which, questions may arise very different from those that have already arisen in connection with telephonic communications. It is in connection with the admissibility in evidence of telephonic messages that this article will treat.

Some will say that the telephone at this late day can hardly be called a new invention. That is very true; but it has nevertheless been the subject of litigation to a very small extent. It is strange, too, when we consider the vast amount of business that is daily transacted over the telephone; and now that the long distance has come into such general use it has in a great measure displaced the telegraph. Some legal effect must be given to such transactions, just as in the case of business transacted by mail, telegraph, etc., which has given rise to so many decisions. The great disadvantage that has presented itself in conducting transactions over the 'phone lies in the fact that they cannot be as readily authenticated or proven as in the case of the mail and telegraph, for the reason that as a rule there are no witnesses, and no documentary proof. Therefore, if a contract is made over the telephone, if the terms of the agreement are disputed, how will the court ascertain what the bargain between the parties really is?

Courts of justice do not ignore the great improvement in the means of inter-communication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scien-

tific knowledge, of which the courts will take judicial notice as part of the public contemporary history. Testimony so taken may be entitled to much or little weight, but with that the court do not concern themselves. That remains with the triers of facts. Wolfe *v.* Missouri Pac. Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331.

In Globe Printing Co. *v.* Stahl, 23 Mo. App. 458, the court said: "The telephone, although a very recent invention, has come into such common use that, we think, as the learned judge of the circuit court is reported to have reasoned, that, the courts may properly take judicial notice of the general manner and extent to which it is made use of by the business community. No doubt very many important business transactions are every day made by telephonic communications of precisely the same character as that which the witness was allowed to testify in this case. A person is called up by one desiring to communicate with him by means of a connection of their respective wires through what is known as the central office. A conversation ensues. It may be relative to the most important matters of business. It may involve a contract for the sale of bonds and stocks, instructions from a principal to his agent touching important transactions, or the acknowledgment of a debt due and a promise to pay the same. The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community, if the courts were to hold that business men are not entitled to act upon the faith of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way."

As the court said in Wolf *v.* Missouri Pacific Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331, "when a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel."

General Rule as to Admissibility.

That conversations held through the medium of a telephone are admissible in evidence, when pertinent, cannot be doubted. Such has been the uniform holdings of the courts in cases where the question has been before them. Oskamp *v.* Gadsdan, 35 Neb. 7, citing People *v.* Ward, 3 N. Y. Crim. Rep. 483; Wolf *v.* Mis-

souri Pacific Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331; Globe Printing Co. *v.* Stahl, 23 Mo. App. 451; Sullivan *v.* Kuydendall, 82 Ky. 483, 56 Am. Rep. 901.

NECESSITY FOR IDENTIFICATION OF SPEAKER—MISSOURI RULE.

In Wolfe *v.* Mo. Pacific Railway Company, 97 Mo. 473, 10 Am. St. Rep. 331, which was followed in Globe Printing Co. *v.* Stahl, 23 Mo. App. 451, the court held, that where a person places himself in connection with the telephone system through an instrument, he invites communication in relation to his business, through that channel; conversations so held are admissible in evidence, just as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible.

In Globe Printing Co. *v.* Stahl, 23 Mo. App. 451, the question arose whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's bookkeeper and the person who answered to the defendant's name. The bookkeeper testified amongst other things that he did not know whose voice it was; that the witness did not know the defendant's voice, but that he asked through the telephone if that was the defendant, and the answer was "Yes." The court held, that the answer purporting to come from the defendant was admissible without positive proof that the defendant sent the answer. Citing Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

In Missouri Pacific R. Co. *v.* Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861, which was a suit against a carrier for nondelivery of goods, the witness testified that he made demand for the goods through the telephone; that he asked for the Missouri Pacific freight office, and presumed it was given him; that he asked if the goods in controversy were there, and was answered by the person at the freight office that the goods had been shipped back; that he did not remember who spoke to him through the telephone from the other end of the line, but he recognized the voice of the person answering at the time as one of the employees of the office with whom he had transacted business at that office. Objection was made to the admission of this evidence, because the

witness could not state the name of the party who answered his message, nor that he was the agent of the defendant. The court said: "We think the objection, considered with reference to the reasons urged for the exclusion of the evidence, was properly overruled. The circumstances detailed by the witness indicated that the person with whom he was in communication was the agent of the defendant, the Missouri Pacific Railway Company. The inability of the witness to give the name of the person would bear rather upon the question of the weight than the admissibility of the evidence."

Whether or not the Missouri cases will be followed, remains to be seen. It seems a safer rule to require that the voice should be recognized, and promiscuous talking in any one's establishment guarded against. If such communications are to be received as evidence, they will require the best of safeguards thrown around them. In Missouri the above will necessarily be received as law, but fortunately decisions of one state do not amount to anything in another, unless the court of such other state finds that the same is attended with common sense and reason. This rule might work well in some cases and in others not. Such communications should not amount to testimony unless the parties know by some means, to whom they are talking. The person responding at such a place of business, should in some manner be identified or shown to be a representative of such establishment.

Illinois and New York Rule.

But in a well-considered Illinois case, the court seems to recognize the danger of this rule that has been adopted in Missouri, and refused to receive evidence of a conversation over a telephone between the plaintiff and a person in the defendant's office, because the former did not know whether this telephone conversation was in fact held with the latter or not. Kimbark *v.* Illinois Car, etc., Co., 103 Ill. App. 632.

In People *v.* Ward, 3 N. Y. Crim. R. 483, 511, it was said that if the person receiving the message can recognize the voice of the sender, or testifies that he recognized it, there is but little objection to his being permitted to state the contents of the communication thus received.

CONVERSATIONS BY AID OF OPERATOR.

An operator of a telephone called upon to conduct a conversation between two parties, becomes thereby the agent of both, and what he repeats to one as being said by the other, is admissible in evidence against the latter, and is not hearsay. It is competent, because it is the declaration of an agent made during the progress of a transaction in which he represents his principal. Oskamp *v.* Gadsden, 35 Neb. 7, 37 Am. St. Rep. 428, approving Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

In Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901, the appellee went to a telephone office at Morgantown to communicate with appellants, at Bowling Green, directing the operator to converse with them, he not being accustomed to the use of the instrument. He directed the operator to call for appellant Sullivan, and the operator at B. reported that he would send for him to come to the office. Soon after, the operator at Morgantown told appellant that Sullivan was at the Bowling Green office, Sullivan using the telephone for himself, and the Morgantown operator speaking for appellee. They had a conversation of some length, the operator telling appellee what Sullivan said as it came over the wire. Sullivan testified that he had a conversation over the telephone with some one at Morgantown, and upon the same subject to which the appellee says the conversation related; but they differed widely as to what was said. The operator was called and testified that he had a conversation upon the subject with some one at Bowling Green whom the speaker there said was Sullivan, but did not remember what was said. The trial court permitted the appellee to prove by himself and two other persons who were present at the time, what the Morgantown operator reported to appellee, while the conversation was going on over the wire, as being said by Sullivan. The court held, that it was competent to prove, by the Morgantown operator, what Sullivan said to him. The court said: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party, and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction." This decision was not made by a full court, one of the judges in a dissenting opin-

ion, saying, that to establish the rule, that the declarations of the one receiving the message as to the substance of the responses made, is competent testimony, is subversive not only of a well-recognized rule of evidence, but dangerous in its application, and that the operator is not in a legal sense an interpreter; that the testimony is purely hearsay, and that all reasons induced by considerations of both public and private interests, for excluding that character of testimony, apply with great force.

ACKNOWLEDGMENT OF DEED OVER 'PHONE.

In Banning *v.* Banning, 80 Cal. 271, 13 Am. St. Rep. 156, an acknowledgment of a deed by means of the telephone, was held to be good, in the absence of fraud, accident or mistake. The certificate of the notary, in due form, was conclusive of the material facts therein stated. The general principle of law that a notary's certificate as to the facts stated in it, citing Jones on Mtgs., sec. 538; 57 Cal. 141, and Baldwin *v.* Snowder, 11 Ohio St. 203, really controlled the decision.

PROOF OF CONVERSATION BY BYSTANDERS.

It has been held, that a bystander may testify to the part heard by him of a conversation by telephone, such conversation being shown aliunde to have been between the parties to a suit, and upon the subject matter thereof. Of course he could not hear, and could not attempt to state what occurred at the other end of the line, but this is no objection to admitting the evidence. Dannemiller *v.* Leonard, 15 Ohio Circuit Court 686, affirmed by the Supreme Court in 61 O. St. 658, citing 153 Ill. 262.